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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 283.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

against

MURRY GUGGENHEIM,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR MURRY GUGGENHEIM IN OPPOSITION.

ELIHU ROOT, JR.,
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The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

INDEX.

	PAGE
The Petitioner's Claim of a Conflict with Means v. United States	2
The Petitioner's Further Claims of Conflict	4
The Correctness of the Decision below	12
Conclusion	18
Appendix—Gift Tax Provisions, Revenue Act of 1924 and Revenue Act of 1932	19

CITATIONS.

CASES:

	PAGE
Allen *v.* Hendrick, 104 Ore. 202	11
Baker *v.* Baker, 123 Md. 32	11
Basket *v.* Hassel, 107 U. S. 602	10, 11
Bowen *v.* Kutzner, 167 Fed. 281	11
Chase National Bank *v.* United States, 278 U. S. 327	4, 6, 7, 9, 17
Copland *v.* Commissioner, 41 F. (2d) 501	11
Corliss *v.* Bowers, 281 U. S. 376	9, 10, 17
Cramer *v.* Hartford-Connecticut Trust Co., 110 Conn. 22	12
Crooks *v.* Harrelson, 282 U. S. 55	13
Dickerson's Appeal, 115 Pa. 198	11
Dolan's Estate, *In re*, 279 Pa. 582	12, 13
Edson *v.* Lucas, 40 F. (2d) 398	11
Farmers Loan & Trust Co. *v.* Bowers, 29 F. (2d) 14	12
Gilchrist, *Ex parte*, 17 Q. B. D. 521	13
Gould *v.* Gould, 245 U. S. 151	13
Halls Estate, *In re*, 99 N. J. L. 1, affirmed 100 N. J. L. 405	13
Iselin *v.* United States, 270 U. S. 245	13
Jones *v.* Clifton, 101 U. S. 225	10, 11, 12, 13, 17, 18
Kelly *v.* Parker, 181 Ill. 49	12
Means *v.* United States, 39 F. (2d) 748, certiorari denied 282 U. S. 849	2, 3
National Newark & Essex Banking Co. *v.* Rosahl, 97 N. J. Eq. 74	12
Nichols *v.* Emery, 109 Cal. 323	12

PAGE

Poe *v.* Seaborn, 282 U. S. 101 ..... 9, 10

Reinecke *v.* Northern Trust Co., 278 U. S. 339 ..... 4, 5, 6, 7, 9, 17

Shattuck *v.* Burrage, 229 Mass. 448 13

Smietanka *v.* First Trust & Savings Bank, 257 U. S. 602 ..... 13, 15

Stone *v.* Hackett, 12 Gray (Mass.) 227 12

Tyler *v.* United States, 281 U. S. 497 ..... 7, 8

United States *v.* Field, 255 U. S. 257 ..... 13, 15, 17

United States *v.* Merriam, 263 U. S. 179 13

Van Cott *v.* Prentice, 104 N. Y. 45 12

STATUTES:

Section 201, Revenue Act of 1916, 39 Stat. 777. 8

Section 202, Revenue Act of 1916, 39 Stat. 777. 8, 9

Section 402, Revenue Act of 1921, 42 Stat. 278. 4, 5

Section 219(g), Revenue Act of 1924, 43 Stat. 277 ..... 14, 16

Section 302(d), Revenue Act of 1924, 43 Stat. 304 ..... 14, 15

Section 319, Revenue Act of 1924 (Act June 2, 1924, c. 234, 43 Stat. 313; U. S. C., Title 26, Sec. 1131) 2, 19

Section 1200(a), Act Feb. 26, 1926, c. 27, 44 Stat. 125 2

Section 501, Revenue Act of 1932, Public No. 154—72d Congress 2, 17, 19

MISCELLANEOUS:

Article 25, Regulations 37 15

Article 341, Regulations 45 15

Law Opinion 1102, Int. Rev. Cum. Bull. I-2, p. 50 ..... 12, 16

T. D. 3487, Int. Rev. Cum. Bull. II-1, p. 301. 15

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BRIEF FOR MURRY GUGGENHEIM IN OPPOSITION.

The judgment of the Circuit Court of Appeals for the Second Circuit (R. 239) and the opinion on which that judgment is based (R. 233, 58 F. (2d) 188) deal with a single and very simple question.

In 1917 Murry Guggenheim created two revocable trusts,

one for his son and one for his daughter.[1] In 1924 Congress passed a Revenue Act, Section 319 of which imposed a tax upon "the transfer * * * by gift * * * of any property * * *".[2] Thereafter, in 1925, Murry Guggenheim surrendered his powers to revoke these trusts. The only question before the Court below was whether the surrender of those powers was a transfer by gift of property. The Court below decided that it was not.

The Petitioner's Claim of a Conflict With Means v. United States.

The petitioner claims in support of his application that the decision below is in conflict with the decision of the Court of Claims in *Means* vs. *United States*, 39 F. (2d) 748. That is true. But the question on which the conflict exists cannot recur. It is not a question of general interest. The gift tax section under which our case arises was repealed six years ago. (Section 1200(a), Act Feb. 26, 1926, c. 27, 44 Stat. 125.) A new gift tax has been enacted but Congress has changed the wording so that the new Act, instead of taxing simply transfers by gift of property now also specifically taxes the relinquishment of powers to revoke. (Section 501, Revenue Act of 1932, Public No. 154—72 Congress, see Appendix, p. 19, for text of statute). Congress has changed the language of the gift tax section

[1] Note: It is stated on page 3 of the petition that broad powers of control of the investment and administration of the trust property were reserved, but these had been given up long before the Act of 1924 was passed (R. 34).

[2] (Act June 2, 1924, c. 234, 43 Stat. 313; U. S. C., Title 26, Sec. 1131, See Appendix, p. 19, for text of statute.)

in respect of powers to revoke just as it formerly changed the language of the income tax and estate tax sections in respect of powers to revoke. It will never go back to the older and narrower form of gift tax any more than it will go back to the older and narrower form of estate tax or income tax. The question will not recur. It is not one of general interest. It relates to the interpretation of a repealed and now obsolete statute. Its decision will furnish no guide for the determination of future cases for such cases cannot arise.

Certiorari was applied for in the *Means* case, *supra,* by the taxpayer and was denied, 282 U. S. 849. In that case the Government closed its brief in opposition to the granting of the writ by saying:

> "* * * The gift tax is no longer in force, and the question in this case can not arise under Revenue Acts subsequent to that of 1926. As far as we can learn, the point has been raised in the case of only one other taxpayer. This case, which involves a substantial amount, is now before the Board of Tax Appeals." (No. 207, October Term, 1930. Brief for the United States in Opposition, p. 6.)

The one other case there referred to was the case now at bar. The question involved can no more recur now than it could then—it is no more interesting or important now than it was then.

If the mere fact of a conflict between the Court of Claims and the Circuit Court of Appeals is enough in itself, without any showing of general interest or likelihood of recurrence, then the petitioner should have his writ, but not otherwise; for the petitioner's other arguments in support of his application are unsound. Let us consider these arguments.

The Petitioner's Further Claims of Conflict.

The petitioner claims on pages 5 and 6 of his petition and on pages 10 to 14 of his brief that there is a conflict between the decision below and the decisions of this Court in the cases of *Chase National Bank* vs. *United States,* 278 U. S. 327, and *Reinecke* vs. *Northern Trust Co.,* 278 U. S. 339. This claim is absolutely unfounded. What are these cases as to which a conflict is claimed?

In the *Chase Bank* case a man took out a policy of life insurance payable to his wife, reserving a right to change the beneficiary. Thereafter the Revenue Act of 1921 (Section 402(f), 42 Stat. 278) by clear and specific words, provided that the amount in excess of $40,000 receivable on life insurance taken out by the decedent and payable to beneficiaries other than his executor should be taxed as part of the decedent's gross estate.* Then the insured died without making any change of beneficiaries. The Court held that the insurance should be included in the gross estate, in spite of the fact that the Act was passed after the policy was taken out. The Court in supporting this decision talked about the extinction by death of the right to change beneficiaries as being the equivalent of a transfer of the insurance. But this language was used, not in construing a tax provision applying to "transfers", but in supporting the constitutionality of a clearly applicable and specific section requiring the taxation of the insurance. The Court dealt

* (Note: There is an apparent attempt to deny this at the bottom of page 10 of the petitioner's brief.)

only with the question of constitutionality. It said on page 334:

> "In the present case there is no question of the construction of the statute. The tax is plainly imposed by the explicit language of Sections 401 and 402(f) if those sections are to be constitutionally applied."

In the *Reinecke* case a donor created two trusts reserving the power of revocation and reserving the income to himself for life. Then the Revenue Act of 1921 was passed. Section 402(c) of this act required the inclusion, for tax purposes, in the gross estate of a decedent of property "To the extent of any interest therein of which the decedent has at any time made a transfer, * * * in contemplation of or intended to take effect in possession or enjoyment at or after his death * * *". Thereafter the donor died without having exercised his power of revocation.

The Court considered that the trusts involved were clearly intended to take effect in possession or enjoyment at death within the provisions of Section 402(c) and that the only question was a constitutional one. The Court said on page 345 of its opinion:

> "As to the two trusts, it is argued that since they were created long before the passage of the statute imposing an estate tax the taxing statute if applied to them is unconstitutional and void, because retroactive, * * *"

The Court was considering that question and that question alone. It held that the extinction of the right to revoke after the passage of the statute was enough to support the constitutionality of the Act.

The question presented in these two cases was not whether Congress had used language purporting to impose the tax but whether it had power to impose the tax.

The case at bar, on the other hand, involves no question of constitutional power. It is admitted that the Congress could have taxed the surrender of the power to revoke had it chosen to insert in the statute appropriate language to that effect (as it has since done in the new gift tax Act). In the case at bar we have a simple question of interpretation—does the surrender of a power to revoke a trust fall within the words "transfer * * * by gift * * * of * * * property"? In the words of the Court below:

> "The question presented here is not whether Congress had the power to impose a tax which would apply to the act of relinquishment of the power of revocation in the trusts, conveying property for the benefit of named beneficiaries, but whether Congress has done so."

The petitioner in his brief below admitted the difference in the issues raised by the *Chase* and *Reinecke* cases and the case at bar. He said:

> "The petitioner [now the respondent] argues that these cases are not in point because the issue there raised was that of constitutionality, whereas here the petitioner presents no such question but only one of construction. It is true that the ultimate issues raised are not the same, but the attack upon the constitutionality of the statutes in the cases cited was grounded upon the contention that there was in fact no transfer and in order to sustain the statute it was necessary to hold, as the court did and which the quotations show that there was in fact in each case a transfer after the effective date of the statute involved" (page 13).

In the last sentence quoted lies the basic fallacy of the petitioner's whole argument. It was *not* necessary to hold that there had been "a transfer * * * of * * * property" in order to sustain the constitutionality of the statutes in question. There did *not* have to be a transfer of property after the date of the statute. There merely had to be some change in the situation which could constitutionally be made the subject of a tax. Congress is not restricted to transfers in levying taxes. Congress may tax one for remaining a member of a club, for using a foreign built yacht, for riding in a parlor car, for going to the theatre, for drawing a check, or for the mere doing of business.

This Court has explained the situation very clearly in a case later than and similar to the *Chase* and *Reinecke* cases. In *Tyler* vs. *United States,* 281 U. S. 497, the Court in a unanimous opinion said that while the extinction by death of the rights of a tenant by the entirety would not as a matter of interpretation have been taxable under a statute simply imposing a tax on transfers, it could be taxed under a statute specifically applying to such an extinction because the constitutional power to tax did not depend on there being a transfer of property. On pages 502 and 503 the Court said:

> "Section 201 imposes the tax upon the 'transfer of the net estate'; and if that section stood alone, the inclusion of such property [the property subject to the tenancy by the entirety] in the gross estate of the decedent probably could not be justified by the terms of the statute. But Section 202 definitely includes the property and brings it within the reach of the words imposing the tax so that a basis for the constitutional challenge is present. * * *

> "The question here, then, is, not whether there has been, in the strict sense of that word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death had brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which the Congress may call a transfer tax, a death duty or anything else it sees fit) * * *."

There is an almost incredible misuse of this case on page 12 of the petitioner's brief. The Court in the *Tyler* case was dealing with two sections of the Estate Tax of 1916, Section 201 and Section 202 (39 Stat. 777). Section 201 was a simple section, imposing in general terms a tax on the *transfer* of the net estate. It was like the section of the Gift Tax involved in the case at bar. If the Court in the *Tyler* case had said that a transfer of property in the strict sense was not necessary in order to support a tax under this Section 201, the *Tyler* case would have been an authority against us and would have been in conflict with the decision below. But the Court does not say this. It says just the *opposite* to this. It says on page 502 of its opinion:

> "Section 201 imposes the tax upon the "transfer of the net estate"; and if that section stood alone, the inclusion of such property [the interest of the tenant by the entirety] in the gross estate of the decedent probably could not be justified by the terms of the statute."

Then the Court passes to Section 202, a section specifically imposing a tax upon the extinction of the right of a tenant by the entirety, a section under which there arises a con-

stitutional question exactly like the constitutional questions arising in the *Chase* and *Reinecke* cases. The Court says:

> "But Section 202 definitely includes the property and brings it within the reach of the words imposing the tax so that a basis for the constitutional challenge is present."

It is of this section and of this constitutional question that the Court says in the latter part of the quotation that a transfer in the strict sense of the word is not necessary.

The petitioner omits the earlier part of the quotation and makes it appear that the words which the court used of Section 202 and in regard to a question like the question in the *Chase* and *Reinecke* cases, were used of Section 201 and in regard to a question like that in our own case.

The petition at the top of page 7, claims a conflict between the decision below and the principle of the cases of *Poe* vs. *Seaborn,* 282 U. S. 101, and *Corliss* vs. *Bowers,* 281 U. S. 376.

Corliss vs. *Bowers* was a constitutional case involving the power of Congress by clear and specific language to tax a donor on the income of a revocable trust. It differs from our own case in exactly the same way as the *Chase* and *Reinecke* cases.

It is difficult to see what the case of *Poe* vs. *Seaborn* has to do with the point now under discussion. That was a case in which this Court held that a husband resident in California was not taxable on the entire community income of himself and his wife. It was a case decided in favor of the taxpayer.

The petitioner claims that these cases establish the principle that the retention of the right to revoke made the donor the owner of the corpus (Petitioner's brief, p. 14). That conclusion is directly in conflict with *Jones* vs. *Clifton,* 101 U. S. 225, and the other cases cited on page 12 below. In support of his theory the petitioner quotes on page 7 of his petition the following language from the *Poe* case:

> "While he has technically parted with title, yet he in fact retains ownership, and all its incidents."

The petitioner should have begun the quotation earlier:

> "The Corliss case raised no issue as to the intent of Congress, but as to its power. We held that where a donor retains the power at any time to revest himself with the principal of the gift, Congress may declare that he still owns the income. While he has technically parted with title, yet he in fact retains ownership, and all its incidents."

Does not the completed quotation indicate clearly that the result in the *Corliss* case would have been different if the case had been dealing with the intent of Congress and not with its power, if Congress had not specifically declared that the income of the trust was to be taxed to the donor?

A further reason given by the petitioner for the granting of the writ, is that the decision below is in conflict with *Basket* vs. *Hassel,* 107 U. S. 602, where the court said that there could be "no valid gift *inter vivos* unless it divest the owner of all personal control and dominion over it, absolutely and irrevocably". This point is based on an elementary misconception. It is true, of course, that a tech-

nical gift *inter vivos* at common law was not effective to pass any title whatever unless it was irrevocable.

Basket vs. *Hassel,* 107 U. S. 602, 614;
Bowen vs. *Kutzner,* 167 Fed. 281, 296 (1908);
Copland vs. *Commissioner,* 41 F (2d) 501, 504 (7th C. C. A. 1930);
Edson vs. *Lucas,* 40 F (2d) 398, 404 (8th C. C. A. 1930).

But it is equally true at common law that a declaration of trust does transfer legal and equitable title in spite of the reservation of a power to revoke.

Jones vs. *Clifton,* 101 U. S. 225 (1879);
Allen vs. *Hendrick,* 104 Ore. 202 (1922);
Baker vs. *Baker,* 123 Md. 32 (1914);
Dickerson's Appeal, 115 Pa. 198 (1887) and cases cited at p. 12 below.

The petitioner cites no authority contrary to this settled principle.

The Board of Tax Appeals in its opinion below recognized this distinction and was at great pains to argue that the statute applied to donative trusts as well as to strict gifts *inter vivos* (R. 201). If the statute did apply only to strict gifts *inter vivos* the petitioner would be out of court, for no such gift occurred.

The Correctness of the Decision Below.

The decision below was right and is squarely supported by the decision of this Court in *Jones* vs. *Clifton*, 101 U. S. 225 (1879), in which this Court said:

> "The powers of revocation and appointment to other uses reserved to the husband in the deeds in question do not impair their validity or their efficiency in transferring the estate to the wife, to be held by her until such revocation or appointment be made. * * *"
>
> "The title to the land and policies passed by the deeds; a power only was reserved. That power is not an interest in the property which can be transferred to another, or sold on execution or devised by will."

It is the common law that the original creation of a revocable trust passes full legal and equitable title to the trustee and beneficiary.

Stone vs. *Hackett*, 12 Gray (Mass.) 227 (1858);
In re Dolan's Estate, 279 Pa. 582 (1924);
Nichols vs. *Emery*, 109 Cal. 323 (1895);
Cramer vs. *Hartford-Connecticut Trust Co.*, 110 Conn. 22 (1929);
Kelly vs. *Parker*, 181 Ill. 49 (1899);
National Newark & Essex Banking Co. vs. *Rosahl*, 97 N. J. Eq. 74 (1925);
Van Cott vs. *Prentice*, 104 N. Y. 45 (1887);
Farmers Loan & Trust Co. vs. *Bowers* 29 F. (2d) 14 (2d C. C. A. 1928);
Law Opinion 1102, Int. Rev. Cum. Bull. I-2, p. 50 (1922).

It is likewise the common law that the reserved power to revoke is not a property right and that its extinction is not a transfer of property.

Jones vs. *Clifton*, 101 U. S. 225 (1879);
Ex parte Gilchrist, 17 Q. B. D. 521 (1886);
In re Hall's Estate, 99 N. J. L. 1 (1923); affirmed without opinion, 100 N. J. L. 405;
In re Dolan's Estate, 279 Pa. 582 (1924);
Shattuck vs. *Burrage*, 229 Mass. 448 (1918).

Moreover, the Court below was dealing with a taxing Act in regard to which a certain strictness of construction is required by the decisions of this Court.

Gould vs. *Gould*, 245 U. S. 151 (1917);
Smietanka vs. *First Trust & Savings Bank*, 257 U. S. 602 (1922);
United States vs. *Merriam*, 263 U. S. 179 (1923);
Crooks vs. *Harrelson*, 282 U. S. 55 (1930);
Iselin vs. *United States*, 270 U. S. 245 (1926).

The Court below was clearly right in holding that the words "transfer * * * by gift * * * of * * * property", in a taxing act subject to the rule of strict construction enjoined upon it by this Court, did not include the extinction of a right of revocation which was "not an interest in the property which can be transferred to another, * * *".

The decision below is also supported by *United States* vs. *Field*, 255 U. S. 257 (1921). Mrs. Field had a life interest in a trust fund and a power of appointment in regard to a portion of it. She exercised the power by will on her death.

The Revenue Act of 1916 imposed a tax on the "transfer of the net estate * * *" and included in that estate "property * * * to the extent of any interest therein of which the decedent has at any time made a transfer * * * intended to take effect in possession or enjoyment at * * * his death * * *". If Mrs. Field transferred property by her exercise of the power of appointment it was, of course, a transfer intended to take effect, and actually taking effect, at her death. The court held that she did not transfer property because she had no ownership of the property covered by the power. There is an exact similarity between the *Field* case and our case except for the difference in the degree of control, if such there be, involved in the possession of a life interest coupled with a general power to appoint and in the possession of a general power to revoke.

The petitioner suggests, on pages 14 and 15 of his brief, that the normal import of the words of the gift tax section of the 1924 Act might be extended if we considered those words in connection with the estate tax provisions. On the contrary, the construction by the Court below of the words of the gift tax section in the Act of 1924 is strongly supported by the contrast between that section, wholly silent as to revocable trusts, and the estate tax and income tax sections [219(g) and 302(d), 43 Stat. 277, 304] of the same Revenue Act, specifically dealing with revocable trusts.

The construction of the Court below is also supported by the history of the construction of the estate tax and income tax sections. The estate tax sections in the early acts did not specifically require the inclusion of property subject to a revocable trust in the gross estate. The Bureau first

ruled in 1919 that such property should be included in the net estate on the donor's death (Art. 25, Reg. 37). This ruling the Bureau rescinded after argument, in 1923 (T. D. 3487, Int. Rev. Cum. Bull. II-1, page 301). In the Act of 1924, however, the Congress added a specific provision requiring the inclusion in the gross estate of property subject to a revocable trust.[1] (Section 302(d).) Thereafter the question was not one of interpretation but one of constitutional power and thereafter the Bureau ruled, and properly ruled, that property subject to a revocable trust was taxable.

Turning to the income tax we find in the early acts no provision relating to the income of a revocable trust. We find again that the Bureau originally ruled that the income of such trusts should be taxed to the donor, (Art. 341, Reg. 45) and we find again that on argument the Bureau rescinded this ruling and held that the income of such trusts, should not be taxed to the donor. This latter holding was based upon a clear statement of the common law by the Solicitor of the Bureau:

> "Essentially the powers reserved in the trust in question do not differ from, nor are they more extensive than, those considered by the United States Supreme Court in the case of *Jones* v. *Clifton*, 101 U. S. 225. As that Court sustained as a legally constituted trust against the seller's creditors the transfer involved therein, there seems no argument available for regarding the trust in question (considered, as here—we must, uninfluenced by any question of taxation under a death duty act, as hereafter pointed out) as not

[1] This court has previously indicated that such a change in a statute will be regarded as amendatory rather than as declaratory. *United States* vs. *Field*, 255 U. S. 257 at p. 264; *Smietanka* vs. *First Trust & Savings Bank*, 257 U. S. 602 at p. 607.

vesting the interests of the beneficiaries *in praesenti*. After the execution and delivery of the trust deed, the trustee became the owner of the legal title, at least so far as was necessary to carry out the purposes of the trust. The beneficiaries could have maintained an action to compel the trustee to make payment of the income from the trust to them as long as they were beneficiaries and the trust remained unrevoked. The death of A merely prevented the trust from being revoked and the removal of any names from the pension list and ended the possibility of the title being divested during his lifetime. However, the extinction of the possibility of the divesting did not result in the vesting of any new right. The right of revocation became extinct, but no property right passed to anyone" (L. O. 1102, Int. Rev. Cum. Bull. I-2, page 50 [1922]).

Thereafter in the Act of 1924 the Congress added a section specifically requiring that the income of a revocable trust should be taxable to the donor. (Section 219(g).) The question then ceased to be one of interpretation and became one of constitutional power and the Bureau thereafter ruled and properly ruled that the income of a revocable trust was taxable to the donor.

The gift tax section when originally enacted in 1924, like the income tax sections and the estate tax sections when originally enacted, contained no language specifically applying to revocable trusts. A question of interpretation only, therefore, arose and was decided in favor of the taxpayer by the Court below, just as the same question had been decided in favor of the taxpayer by the Bureau in the case of the estate tax sections and of the income tax sections in their original form.

In the new Revenue Act of 1932 the Congress has elaborated the gift tax provision by inserting language specifically applying to powers of revocation (Section 501(c), Revenue Act of 1932). The question under the new Revenue Act ceases to be a question of interpretation and becomes one of constitutional power which, if raised, would presumably be decided in favor of the Government, under the decisions of *Chase National Bank* vs. *United States, Reinecke* vs. *Northern Trust Company* and *Corliss* vs. *Bowers,* and in conformity with the dicta and in entire harmony with the decision of the Circuit Court of Appeals below in the case at bar.

There is an element of justice and fair play involved in the decision of the Court below. In 1925, when these powers to revoke were surrendered, there were in existence none of the constitutional cases which the petitioner claims to be in conflict with the decision of the Court below. We had before us then only the *Field* case and *Jones* vs. *Clifton* and the decisions following them, and the cases on the strict construction of taxing statutes. It seemed to be settled law then that the surrender of a power to revoke was not a transfer of property. Once a rule has been announced by the Supreme Court and has become generally understood, then adherence to the rule ceases to be a casual matter. Property must be administered, plans must be made, action must be taken on the faith and credit of the contemporaneous law, and if we are to change that law without notice and by retroactive interpretation we may inflict outrageous injustice upon those who have acted in reliance upon it. It is not a question of the fundamental logic of the rules. It

is a question of the sanctity which inheres in decisions which have been acted upon in good faith. It may be better that taxation should not be "concerned with the refinements of title", but under *Jones* vs. *Clifton* and the *Field* case, and under the cases on the construction of tax statutes, a tax on a transfer of property in the year 1925 was concerned "with the refinements of title". If by any chance there is some public purpose to be served by the abandonment of the old rules and the old meanings of words, let the change take place by Congressional enactment (as it took place in the case of the income and estate tax laws and as it has now taken place in the new gift tax law) and not by retroactive interpretation which falls like a trap upon those who have acted beyond recall.

Conclusion.

Certiorari should be denied.

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APPENDIX.

Gift Tax Provisions, Revenue Act of 1924 and Revenue Act of 1932.

Section 319 of the Revenue Act of 1924 (43 Stat. 313), enacted June 2, 1924, as amended by Section 324 of the Revenue Act of 1926 (44 Stat. 86), provides as follows:

> "For the calendar year 1924 and the calendar year 1925, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly:
>
> > "1 per centum of the amount of taxable gifts not in excess of $50,000; * * *" etc., at graduated rates.

This provision was repealed as of January 1, 1926, Section 1200(a), Revenue Act of 1926 (44 Stat. 125).

Section 501 of the Revenue Act of 1932, Public No. 154, 72nd Congress, provides as follows:

> "SEC. 501. IMPOSITION OF TAX.
>
> "(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in Section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift.
>
> "(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a non-resident not a

citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

"(c) The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift."